JUDGMENT OF THE COURT (Sixth Chamber)

24 January 2002 *

In Case C-51/00,

REFERENCE to the Court under Article 234 EC by the Cour du travail de Bruxelles (Belgium) for a preliminary ruling in the proceedings pending before that court between

Temco Service Industries SA

and

Samir Imzilyen,

Mimoune Belfarh,

Abdesselam Afia-Aroussi,

Khalil Lakhdar,

intervener:

General Maintenance Contractors SPRL (GMC),

Buyle-Medros-Vaes Associates SA (BMV), formerly **Weisspunkt SA,**

* Language of the case: French.

on the interpretation of Articles 1(1) and 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), R. Schintgen and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Temco Service Industries SA, by D. Votquenne and M. Milde, avocats,

— Mr Imzilyen and Mr Belfarh, by M. Jourdan and T. Desterbecq, avocats,

— Mr Afia-Aroussi and Mr Lakhdar, by D. Fervaille, trade union representative,

— General Maintenance Contractors SPRL (GMC) and Buyle-Medros-Vaes Associates SA (BMV), by E. Carlier and F. Bouquelle, avocats,

— the Commission of the European Communities, by J. Sack and D. Martin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Temco Service Industries SA, of Mr Imzilyen and Mr Belfarh, of Mr Afia-Aroussi and Mr Lakhdar, of General Maintenance Contractors SPRL (GMC) and Buyle-Medros-Vaes Associates SA (BMV), and of the Commission, at the hearing on 17 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2001,

gives the following

Judgment

1 By judgment of 14 February 2000, received at the Court on 17 February 2000, the Cour du travail de Bruxelles (Higher Labour Court, Brussels) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 1(1) and 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26, hereinafter 'the directive').

2 Those questions were raised in proceedings between Temco Service Industries SA (hereinafter 'Temco'), a cleaning undertaking which held the contract for cleaning the production plants of Volkswagen Bruxelles SA (hereinafter 'Volkswagen'), and Messrs Imzilyen, Belfarh, Afia-Aroussi and Lakhdar, employees of General Maintenance Contractors SPRL (hereinafter 'GMC'), the undertaking responsible immediately beforehand, as a subcontractor of Buyle-Medros-Vaes Associates SA (hereinafter 'BMV'), for providing the same services under a previous contract which was terminated. Temco disputes the claim that the employment contracts of those four employees were automatically transferred to it pursuant to the directive.

Legal background

3 According to its Article 1(1), the directive applies to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

4 Article 3(1) of the directive provides:

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.'

5 Article 4(1) of the directive provides:

'The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.'

The national legislation

6 The directive was transposed into Belgian law by Collective Agreement No 32a of 7 June 1985 concluded within the Conseil national du travail (National Labour Council) concerning the safeguarding of employees' rights in the event of a change of employer as a result of the legal transfer of an undertaking and regulating the rights of employees re-engaged in the event of a takeover of assets following insolvency or judicial composition with transfer of assets, rendered mandatory by Royal Decree of 25 July 1985 (*Moniteur Belge*, 9 August 1985, p. 11527), as amended by Collective Agreement No 32c of 19 December 1989 (hereinafter 'Collective Agreement No 32a'), in turn rendered mandatory by Royal Decree of 6 March 1990 (*Moniteur Belge*, 21 March 1990, p. 5114).

7 The collective labour agreement of 5 May 1993 concluded within the joint committee for cleaning and disinfecting undertakings, concerning the engagement of staff in the event of a transfer of contracts for daily maintenance (hereinafter 'the collective agreement of 5 May 1993') provides, in its Articles 1, 4 and 5:

'(Article 1) In the event of the transfer of a contract for daily maintenance as a result of a fresh tendering procedure or pursuant to the decision of the client, the

employer shall endeavour — as far as possible — to ensure the continuity of employment contracts within his undertaking, by means of the transfer of workers or reorganisation. This applies, in any event, to so-called "protected" workers (trades union representatives, candidates in and those elected following elections within the company (see legislation)). ...

...

(Article 4) The undertaking securing the contract shall — within two weeks of securing it and in any event at least one week before resumption of works — offer in writing at least 75% of the jobs on the site after the transfer to workers chosen by it forming part of the staff of the undertaking losing the contract, provided that those workers have at least six months' experience on the site. ...

(Article 5) Workers taken over in accordance with the arrangements set out in Article 4 shall obtain a new contract of employment without any trial period and shall maintain their seniority.'

The main proceedings

8 Volkswagen entrusted the cleaning of a number of its production plants to BMV from 2 May 1993 until December 1994, when it terminated the contract. BMV subcontracted the cleaning work to its subsidiary GMC.

9 By contract signed on 14 December 1994 and taking effect on 9 January 1995 Volkswagen instructed Temco to provide the same services.

10 GMC, whose only business at the time was at Volkswagen's plants, dismissed all its staff, apart from Messrs Imzilyen, Belfarh, Afia-Aroussi and Lakhdar, four protected employees whom it retained pursuant to Article 1 of the collective agreement of 5 May 1993. Following the loss of that contract GMC ceased to be active but did not cease to exist.

11 Pursuant to the provisions of the collective agreement of 5 May 1993, which require the transferee of the business to ascertain from his predecessor how many staff were engaged in the transferred activity and to engage 75% of those staff, Temco, by letter of 15 December 1994, informed BMV that it had taken over the Volkswagen cleaning contract and asked BMV to forward to it the list of staff assigned to that contract. When GMC had forwarded that list to it, Temco re-engaged part of the staff of GMC.

12 At the same time, GMC tried to dismiss the four protected employees under the procedure provided for by national law; it asked the relevant joint committee to acknowledge that there were economic or technical grounds entitling it to dismiss them. That request was rejected.

13 The Tribunal du travail de Bruxelles (Labour Court, Brussels), declared that it lacked jurisdiction to hear the appeal brought before it against that decision. By judgment of 23 November 1995 the Cour du travail de Bruxelles upheld that ruling.

14 Until December 1995, the four employees were assigned to short-time working by GMC although that company had apparently already stated in correspondence that the contracts of those four persons had automatically been transferred to Temco at the time when that company took over the cleaning of the Volkswagen plants, that is to say on 9 January 1995, pursuant to Collective Agreement No 32a implementing the directive. From December 1995, as GMC had ceased to pay them, those four employees brought proceedings against GMC, BMV and Temco before the Tribunal du travail de Bruxelles.

15 By judgment of 12 March 1998, the Tribunal du travail held that the activity of cleaning the Volkswagen plants had been transferred from GMC to Temco by a series of contracts and that there was thus a transfer of an undertaking between those two companies within the meaning of Collective Agreement No 32a and thus of the directive. It took the view, further, that the collective agreement of 5 May 1993 was unlawful in that it required only 75% of staff to be taken over. Accordingly, the Tribunal du travail held that the four employees had been automatically taken over by Temco on 9 January 1995.

16 Temco appealed against that judgment before the Cour du travail de Bruxelles. That Court raised the question of the applicability of the directive in the light of two specific features of the dispute before it.

17 First, GMC, the undertaking transferring the activity, was only a subcontractor of BMV, which held the cleaning contract at issue before Temco, so that GMC never had a contractual relationship with Volkswagen, the original contractor.

18 Second, GMC continued to exist for several years after the contract for cleaning held by BMV had been terminated by Volkswagen.

19 Accordingly, the Cour du Travail de Bruxelles decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1 Does Article 1(1) of Council Directive 77/187 of 14 February 1977 apply in a situation where undertaking A contracts with undertaking B for the cleaning of its industrial plants and undertaking B entrusts that work to undertaking C, which, following loss of the contract by undertaking B, dismisses all its staff, except for four persons, whereupon undertaking D is awarded that contract by undertaking A, employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which latter undertaking continues to exist and to pursue the objects for which it was incorporated?

2 In the event that undertaking C is held to be the transferor, even though it continues to exist, does the abovementioned directive preclude it from being able to retain certain workers in its service?'

The first question

20 By its first question, the referring court is essentially asking whether Article 1(1) of the directive must be interpreted as applying to a situation in which a contractor who has entrusted the contract for cleaning its premises to a first undertaking, which has that contract performed by a subcontractor, terminates that contract and enters into a new contract for the performance of the same work with a second undertaking, where the transaction does not involve any transfer of tangible or intangible assets between the first undertaking or the subcontractor and the second undertaking and where that subcontractor has dismissed almost all its workers but continues to exist and to pursue its company objects, and the second undertaking has taken on, under a collective agreement, part of the staff dismissed by the subcontractor.

21 It is clear from the wording of Article 1(1) of the directive that its applicability is subject to three conditions: the transfer must result in a change of employer; it must concern an undertaking, a business or part of a business; and it must be the result of a contract. The question asked does not concern the change of employer but calls for an analysis of the subject of the transfer and its contractual nature.

The subject of the transfer

22 Temco submits that, in order for a transfer within the meaning of the directive to have been made, an aggregate of independently operated resources must have been transferred. That is not the case where, as in the case in the main proceedings, a contractor terminates a contract with one undertaking and concludes a fresh contract with another undertaking, thus transferring an activity without transferring an economic entity. It further maintains that the mere re-engagement of part of the staff is not sufficient to constitute a transfer, particularly when such re-engagement is required by a sectoral collective agreement such as the collective agreement of 5 May 1993.

23 In that connection it must be observed that the directive is intended to ensure continuity of employment relationships existing within an economic entity, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity (see, in particular, Case 24/85 *Spijkers* [1986] ECR 1119, paragraph 11). The transfer must therefore relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term 'entity' thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (Case C-13/95 *Süzen* [1997] ECR-1259, paragraph 13).

24 In order to determine whether the conditions for the transfer of an economic entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, have been transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of employees have been taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, *Spijkers*, cited above, paragraph 13, and *Süzen*, cited above, paragraph 14).

25 In its judgments in Case C-392/92 *Schmidt* [1994] ECR I-1311, *Süzen*, and Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, the Court has already had to consider the question of the transfer of an economic entity in the cleaning sector. It took the view that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Thus, where, in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets (*Süzen*, paragraph 18).

26 Thus, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. Such an entity is, therefore, capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task (*Süzen*, paragraph 21). Thus, an organised grouping of wage earners who are specifically and permanently

assigned to a common task may, in the absence of other factors of production, amount to an economic entity (*Hernández Vidal and Others*, cited above, paragraph 26).

27 Although Temco submitted at the hearing that the engagement of part of the staff of GMC was imposed on it by a collective agreement (the collective agreement of 5 May 1993), that, in any event, has no bearing on the fact that the transfer concerns an economic entity. It must, moreover, be emphasised that the purpose of the collective agreement of 5 May 1993 is the same as that of the directive and that the collective agreement is expressly intended, as regards the engagement of part of the staff, to cover the case of a new tendering procedure such as that in the case in the main proceedings.

28 Similarly, the fact that the staff of the transferor were dismissed only a few days before the employees in question were taken on again by the transferee, indicating that the reason for the dismissal was the transfer of the business, cannot have the effect of depriving workers of their right to have their contract of employment maintained by the transferee. In those circumstances, such staff must be regarded as still in the employ of the undertaking on the date of the transfer (Case 101/87 *Bork International* [1988] ECR 3057, paragraph 18). In that judgment the Court held that in order to determine whether the employees were dismissed solely as a result of the transfer, it is necessary to take into consideration the objective circumstances in which the dismissal took place, for example, the fact that it took effect on a date close to that of the transfer and that the employees in question were taken on again by the transferee. The staff of GMC must, therefore, be considered to have been part of that company until they were taken on by Temco.

29 Moreover, Article 1(1) of the directive expressly provides that the transfer can concern merely part of a business. Thus, the fact that the transferor undertaking continues to exist after one of its activities is taken over by another undertaking and that it retains part of the staff engaged in that activity has no effect on the classification of the transfer under the directive, since the transferred activity is an

economic entity in its own right (see, to that effect, Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755). In any event, it is clear from the case-file that, although GMC continued to exist as a legal entity after the termination of the cleaning contract between Volkswagen and BMV, it had ceased its only activity, which was taken over by Temco.

The contractual nature of the transfer

30 Under Article 1, the directive is applicable to transfers which are the result of a legal transfer or merger. Temco submits that there is no legal transfer where, as in the case in the main proceedings, there is neither any contractual relationship between the transferor and transferee nor any contractual relationship between the transferor and the original contractor who is only linked to the undertaking which subcontracted the cleaning work to the transferor. According to Temco, the undertaking which entered the cleaning contract with the original contractor did not, perforce, transfer any staff because the cleaning staff belonged to the subcontracting undertaking.

31 However, as the Court has held, the absence of a contractual link between the transferor and transferee cannot preclude a transfer within the meaning of the directive. The transfer can be effected in two successive contracts concluded by the transferor and transferee with the same legal or natural person (see, as regards a change of lessee-manager of a restaurant, Case 324/86 *Tellerup* [1988] ECR 739 ('*Daddy's Dance Hall*'); as regards the conclusion by a municipal authority of a contract with an association following termination of a previous contract with another association to carry out the same activities, Case C-29/91 *Redmond Stichting* [1992] ECR I-3189; and, as regards a change in the ownership of a car dealership, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996]

ECR I-1253). That case-law certainly also applies in a situation where, as in the case in the main proceedings, a contractor enters into two successive cleaning contracts, the second on termination of the first, with two different undertakings (*Süzen*, paragraphs 11 and 12).

32 The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect. In the case in the main proceedings, GMC's relationship with Volkswagen appears to be of a contractual nature within the meaning of the directive, since BMV, having had the contract awarded to it by Volkswagen, by contract concluded by the undertaking, in turn entrusted the performance of the contract to GMC by subcontract. Moreover, such subcontracts create direct links between the contractor and the subcontractor, which may be legal, as in the case of direct payment, and which are in any event practical links, as in the case of the monitoring and daily supervision of the work done. Such links are particularly important in the dispute in the main proceedings because GMC was set up, as a subsidiary, by BMV solely for the performance of the cleaning contract concluded by that company for the benefit of Volkswagen.

33 The answer to the first question referred for a preliminary ruling should therefore be that Article 1(1) of the directive must be interpreted as applying to a situation in which a contractor which has entrusted the contract for cleaning its premises to a first undertaking, which has that contract performed by a subcontractor, terminates that contract and enters into a new contract for the performance of the same work with a second undertaking, where the transaction does not involve any transfer of tangible or intangible assets, between the first undertaking or the subcontractor and the second undertaking, but the second undertaking has taken on, under a collective labour agreement, part of the staff of the subcontractor, provided that the staff thus taken on are an essential part, in terms of their number and their skills, of the staff assigned by the subcontractor to the performance of the subcontract.

The second question

34 By its second question, the referring court is essentially asking whether Article 3(1) of the directive must be interpreted as meaning that it does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking within the meaning of Article 1(1) of the directive from continuing with the transferor.

35 Article 3(1) of the directive lays down the principle of the automatic transfer to the transferee of the rights and obligations incumbent on the transferor under the contracts of employment existing on the date of the transfer of the undertaking. The rule resulting from those provisions, according to which the transfer takes place without the consent of the parties, is mandatory; it is not possible to derogate from it in a manner prejudicial to employees. Consequently, the implementation of the rights conferred on employees by the directive may not be made subject to the consent of either the transferor or the transferee nor the consent of the employees' representatives or the employees themselves (Case C-362/89 *D'Urso and Others* [1991] ECR I-4105, paragraph 11).

36 However, although the transfer of the contract of employment is thus imposed on both employer and employee the Court has conceded that the employee has the option of refusing to have his contract of employment transferred to the transferee (see *inter alia* Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraphs 31 to 33). In such a case, the position of the employee depends on the legislation of the individual Member State: the contract binding the employee to the transferring undertaking may be terminated either by the employee or by the employer or the contract may be maintained with that undertaking (see *inter alia Katsikas and Others*, cited above, paragraph 36).

37 The answer to the second question referred for a preliminary ruling should therefore be that Article 3(1) of the directive must be interpreted as meaning that

it does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking within the meaning of Article 1(1) of the directive from continuing with the transferor where that worker objects to the transfer of his employment contract or employment relationship to the transferee.

Costs

38 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Cour du travail de Bruxelles by judgment of 14 February 2000, hereby rules:

1. Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or

parts of businesses must be interpreted as applying to a situation in which a contractor which has entrusted the contract for cleaning its premises to a first undertaking, which has that contract performed by a subcontractor, terminates that contract and enters into a new contract for the performance of the same work with a second undertaking, where the transaction does not involve any transfer of tangible or intangible assets between the first undertaking or the subcontractor and the second undertaking, but the second undertaking has taken on, under a collective labour agreement, part of the staff of the subcontractor, provided that the staff thus taken on are an essential part, in terms of their number and their skills, of the staff assigned by the subcontractor to the performance of the subcontract.

2. Article 3(1) of Directive 77/187 must be interpreted as meaning that it does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking within the meaning of Article 1(1) of that directive from continuing with the transferor where that worker objects to the transfer of his employment contract or employment relationship to the transferee.

Macken Gulmann Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 24 January 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber